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THE LOCALITY'S CASE FOR SAFE INJECTION FACILITIES: LEGAL OBSTACLES AND WAYS TO OVERCOME THEM

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Abstract. The legality of safe injection facilities as a harm reduction method in response to the national opioid crisis continues to be a challenging and evolving issue involving federal, state, and local jurisprudence. As one indication of the predominance of local government in dealing with these issues, in February 2020 Philadelphia's proposed safe injection facility (SIF) successfully fended off a challenge from the U.S. Department of Justice in federal district court,¹ a decision now stayed pending appeal.² While *United States v. Safehouse* is an important legal step for harm reduction advocates, it is not a guarantee of legality for SIFs. Commentators have paid close attention to the federal prosecution of SIFs, but federal law is just one impediment. Just as a federal prosecutor may seek to block a SIF, so may the state, the city council, or the police. A municipality seeking to open such a facility must coordinate among many stakeholders and then clear legal hurdles at each level of government before facing the U.S. Attorney. The legal pathway for SIFs was forged by other harm reduction policies that incubated at the local level. This Article addresses the legal status of safe injection facilities (SIFs) in the context of local harm reduction policies. Part I will provide a brief summary of the modern opioid crisis and government response. Part II will explore how harm reduction policy, especially for addressing drug use, is effectuated at the level of local government. Part III will discuss how SIFs fit into the same framework of harm reduction policies incubated locally. Finally, Part IV will review the state and federal legal challenges for SIFs and examine how those challenges fared in *United States v. Safehouse*.

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¹ See *United States v. Safehouse*, No. 19-0519, 2020 U.S. Dist. LEXIS 31620, at *1 (E.D. Pa. Feb. 25, 2020).

² See *United States v. Safehouse*, No. 19-519, 2020 U.S. Dist. LEXIS 110549, at *1 (E.D. Pa. June 24, 2020).

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I. BACKGROUND ON THE OPIOID CRISIS

A. A brief history of the modern opioid crisis

A problem as large as the opioid crisis can be described in many ways. Drug overdose is the leading cause of injury-related death in the United States.³ It is so prevalent that “[e]very day in America is like a 747 plane crash[. . .].”⁴ In 2017 alone, more than 70,000 people in the United States died from overdose, a number exceeding all U.S. military casualties during the Vietnam War.⁵ Philadelphia’s overdose death rate is four times its murder rate.⁶ Suffice it to say, the misuse of opioids—heroin, prescription pain medication, and synthetic opioids—is one of the deadliest public health crises in recent memory and likely the deadliest drug-related disaster in U.S. history.⁷

An opioid drug, or “opioid,” is a drug that binds to opioid receptors in the brain with the effect of dulling the perception of pain.⁸ Pharmaceutical opioids are prescribed for pain management, but their use can also produce euphoric effects, which can lead to drug abuse.⁹ Scholars point to over-prescription of opioid pain medication as the root of the opioid crisis in the United States.¹⁰ When

³ Ashley Duckworth, *Fighting America’s Best-Selling Product: An Analysis of and Solution to the Opioid Crisis*, 26 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 237, 240 (2019) (citing Nat’l Inst. on Drug Abuse, *Overdose Death Rates*, DRUGABUSE.GOV, <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates> [https://perma.cc/V7UE-NVN9] (Jan. 2019)); see also *Opioid Overdose*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/index.html> [https://perma.cc/ZQR3-G3BY] (last updated Sept. 3, 2020).

⁴ Taylor Cairns, *Portland Social Worker Representing Maine at Opioid Epidemic Conference*, WGME (July 9, 2019), <https://wgme.com/news/local/portland-social-worker-representing-maine-at-opioid-epidemic-conference> [https://perma.cc/3DRZ-NLHT].

⁵ Anthony Zurcher, *Opioid Addiction and Death Mail-Ordered to Your Door*, BBC NEWS (Feb. 22, 2018), <https://www.bbc.com/news/world-us-canada-43146286> [https://perma.cc/3S8J-FJL2] (“By [2017], more Americans had died from opioids than in the Vietnam, Iraq and Afghanistan wars combined.”); Amber A. Leary, *A Safe Harbor in the Opioid Crisis: How the Federal Government Should Allow States to Legislate for Safe Injection Facilities in Light of the Opioid Public Health Emergency*, 84 BROOK. L. REV. 635, 641 (2019).

⁶ Aubrey Whelan, *Safe Injection Sites to Fight Opioid Overdose Deaths Get Green Light from Philadelphia Officials*, PHILA. INQUIRER (Jan. 23, 2018), <https://www.philly.com/philly/health/addiction/safe-injection-sites-overdose-deaths-opioids-philadelphia-officials-support-20180123.html> [https://perma.cc/9VS9-G538].

⁷ See Leo Beletsky & Corey S. Davis, *Today’s Fentanyl Crisis: Prohibition’s Iron Law, Revisited*, 46 INT’L J. DRUG POL’Y 156, 156 (2017).

⁸ Nat’l Inst. on Drug Abuse Blog Team, *What Is an Opioid?*, MICH. MED., <https://medicine.umich.edu/dept/pain-research/what-opioid> [https://perma.cc/BD42-ET4C] (last visited Sept. 26, 2020).

⁹ *Id.*

¹⁰ E.g., Corey S. Davis & Derek H. Carr, *The Law and Policy of Opioids for Pain Management, Addiction Treatment, and Overdose Reversal*, 14 IND. HEALTH L. REV. 1, 9 (2017) (“Opioid prescriptions nearly quadrupled from 1999 to 2010, accompanied by a nearly identical rise in the rate of prescription opioid-related deaths. . . . [I]t is clear that this increase in opioid prescriptions and related addiction has also helped fuel the recent increase in heroin overdose in the United States, which more than tripled between 2010 and 2013.”). For brief histories of the emergence of the opioid epidemic, see Nabarun Dasgupta et al., *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 AM. J. PUB. HEALTH 182, 182–83 (2018); Ameet Sarpatwari et al., *The Opioid Epidemic: Fixing a Broken Pharmaceutical Market*, 11 HARV. L. & POL’Y REV. 463, 464–77 (2017).

prescription drugs run out or become prohibitively expensive, users turn instead to heroin or fentanyl, a highly potent synthetic opioid. Pharmaceutical companies have received criticism for zealous marketing of opioid pain medication¹¹ and are increasingly facing liability for their role in the opioid crisis.¹² Beyond corporate irresponsibility, scholars also blame the government's punitive "War on Drugs" approach to opioid use, as opposed to an addiction treatment-based approach, for exacerbating the problem.¹³

The trend of opioid consumption is generally on the rise. Opioid prescriptions nearly quadrupled from 1999 to 2010, accompanied by a nearly identical rise in the rate of prescription opioid-related deaths;¹⁴ a more recent study identifies synthetic opioids and spikes in eastern states and the District of Columbia as increasingly deadly.¹⁵ Nationwide, overdose deaths decreased four percent between 2017 and 2018¹⁶ but increased again in 2019, with even more deaths anticipated in 2020 due to the COVID-19 pandemic.¹⁷

¹¹ See Andrew Kolodny et al., *The Prescription Opioid and Heroin Crisis: A Public Health Approach to an Epidemic of Addiction*, 36 ANN. REV. PUB. HEALTH 559, 562 (2015) (documenting efforts by Purdue Pharma, makers of Oxycontin, to encourage prescribing of opioids for pain); Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 221–23 (2009) (describing the aggressive promotion of Oxycontin for the "non-malignant" pain market and subsequent increase in prescriptions).

¹² The most prominent case against opioid manufacturers, pharmacies, and medical providers is *In re National Prescription Opiate Litigation*, No. 1:17-cv-02804, 2018 WL 4895856, at *1 (N.D. Ohio Oct. 5, 2018), an ongoing multidistrict litigation encompassing product liability, negligence, and public nuisance claims from more than 2,500 cities, counties, tribal authorities, and individuals. In 2019, the state of Oklahoma won a \$572 million verdict against Johnson & Johnson in Oklahoma state court, as well as settlements from co-defendants Purdue Pharmaceuticals (\$270 million) and Teva Pharmaceuticals (\$85 million). *State ex rel. Hunter v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486, at *1 (Dist. Ct. Okla. Aug. 26, 2019); Jan Hoffman, *Johnson & Johnson Ordered to Pay \$572 Million in Landmark Opioid Trial*, N.Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html> [<https://perma.cc/3HW2-6W68>]. This verdict is the first ruling to hold a pharmaceutical company responsible for the opioid epidemic, following years of myriad lawsuits and settlements. See James G. Hodge Jr. et al., *Emerging Legal Responses to Curb the Opioid Epidemic*, 45 J. MED. & ETHICS 460, 461 (2017) (describing a 2017 Cherokee Nation suit under "public nuisance" theory and a 2017 suit by the state of South Carolina against pharmaceutical manufacturer Purdue); Davis & Carr, *supra* note 10, at 10 (describing, *inter alia*, a 2006 federal case against Purdue Pharmaceuticals, a 2015 case prosecuted by the Kentucky Attorney General against the makers of OxyContin, and a 2015 case prosecuted by the Oregon Attorney General against pharmaceutical manufacturer Insys).

¹³ See Scott Burris et al., *Stopping an Invisible Epidemic: Legal Issues in the Provision of Naloxone to Prevent Opioid Overdose*, 1 DREXEL L. REV. 273, 277–78 (2009) [hereinafter Burris et al., *Stopping an Invisible Epidemic*] (describing how the War on Drugs has made it more difficult to prevent overdoses as "[i]llicit drugs fluctuate in potency; illicit drug users are often afraid to call 911 when they observe overdoses; and drug users who have been incarcerated face an elevated risk of overdose at release. . .").

¹⁴ Leonard J. Paulozzi et al., Ctrs. for Disease Control & Prevention, *Vital Signs: Overdoses of Prescription Opioid Pain Relievers—United States, 1999–2008*, 60 MORBIDITY & MORTALITY WKLY. REP., Nov. 4, 2011, at 1487, 1489–91.

¹⁵ Matthew V. Kiang et al., *Assessment of Changes in the Geographical Distribution of Opioid-Related Mortality Across the United States by Opioid Type*, JAMA NETWORK OPEN, Feb. 2019, at 1, 4–6.

¹⁶ *Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/epidemic/index.html> [<https://perma.cc/FK3U-JVV8>] (last updated Mar. 19, 2020).

¹⁷ Carla K. Johnson, *New Peak of 71K US Overdose Deaths in 2019 Dashes Hopes*, AP NEWS (Jul. 15, 2020), <https://apnews.com/dc15cae6e299bbb73ce0e4b7d4d02d> [<https://perma.cc/Q646-QWED>]; see also Nora D. Volkow, *Collisions of the*

Public health experts have stated for years that death from opioid overdose is easily and affordably prevented.¹⁸ When a person overdoses using opioids, their breathing slows gradually, which creates a window of time to administer overdose reversal medication.¹⁹ This medication, naloxone, is an opioid antagonist, meaning that it binds to opioid receptors without activating them, thereby displacing the opioids bound there.²⁰ Naloxone is administered as a nasal spray (Narcan) or as an injection.²¹ Someone given naloxone should be monitored for several hours,²² but in many cases aftercare does not require a hospital visit.²³ The relatively low cost and the minimal complexity of naloxone as a medical intervention is in stark comparison to alcohol overdose response, which can require induced vomiting, oxygen therapy, and intravenous fluids.

B. Recent government responses to the opioid crisis

In 2016, President Obama signed into law the Comprehensive Addiction and Recovery Act of 2016 (CARA), the largest piece of drug legislation since the Controlled Substances Act.²⁴ CARA expanded naloxone access, supplied addiction treatment for prisoners and pregnant women, and created task forces on drug trafficking and prescribing practices.²⁵ A few months later, the federal

COVID-19 and Addiction Epidemics, 173 ANNALS INTERNAL MED. 61 (2020) (describing increased COVID-19 challenges and risks for opioid users). The most recent CDC data indicate increased overdose deaths in most states during 2019, driven largely by synthetic opioids such as fentanyl. *VSRP Provisional Drug Overdose Death Counts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://data.cdc.gov/NCHS/VSRP-Provisional-Drug-Overdose-Death-Counts/xkb8-kh2a> [<https://perma.cc/59X2-365Y>] (last updated Sept. 16, 2020); One study suggests that the opioid overdose death toll is even greater than previously estimated due to unspecified overdose records. Andrew J. Boslett et al., *Using Contributing Causes of Death Improves Prediction of Opioid Involvement in Unclassified Drug Overdoses in US Death Records*, 115 ADDICTION 1308, 1308 (2020).

¹⁸ See Burris et al., *Stopping an Invisible Epidemic*, *supra* note 13, at 276–77 (“The heart of the challenge is the possibility that things could be different: overdose is a public health problem that can be solved. Unlike many of the other leading causes of death, death from opioid overdose is almost entirely preventable, and preventable at a low cost. Opioids kill by depressing respiration, a slow mode of death that leaves plenty of time for effective medical intervention. Overdose is rapidly reversed by the administration of a safe and inexpensive drug called naloxone. Naloxone strips clean the brain’s opioid receptors and reverses the respiratory depression causing almost immediate withdrawal.”); Karl A. Sporer, *Strategies for Preventing Heroin Overdose*, 326 BMJ 442, 443 (2003) (describing naloxone as an “inexpensive” intervention).

¹⁹ Burris et al., *Stopping an Invisible Epidemic*, *supra* note 13, at 277.

²⁰ ERIN BAGALMAN & ADA S. CORNELL, CONG. RSCH. SERV., IF10741, NALOXONE FOR OPIOID OVERDOSE: REGULATION AND POLICY OPTIONS 1 (2017).

²¹ *Id.*

²² Nat’l Inst. on Drug Abuse, *Naloxone*, DRUGABUSE.GOV 3 (Sept. 2019), <https://www.drugabuse.gov/sites/default/files/drugfacts-naloxone.pdf> [<https://perma.cc/W7Q2-GMDC>].

²³ See Michael W. Willman et al., *Do Heroin Overdose Patients Require Observation After Receiving Naloxone?*, 55 CLINICAL TOXICOLOGY 81, 82–84 (2017) (reviewing literature to conclude some patients treated with naloxone can be released safely without transport to hospitals if vitals and other factors are normal).

²⁴ Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695 (2016); Leary, *supra* note 5, at 650.

²⁵ Comprehensive Addiction and Recovery Act § 101 (requiring HHS to convene a Pain Management Best Practices Inter-Agency Task Force); § 103 (creating grants to expand access to FDA-approved drugs for emergency overdose treatment); § 201 (creating grants for alternative to incarceration programs and prison-based family treatment programs for pregnant

government provided \$1 billion in grants to states over two years for opioid prevention in the 21st Century Cures Act.²⁶ Most federal drug spending, however, continues to go toward drug control and law enforcement.²⁷ For its part, the Trump administration has emphasized law enforcement and funding the development of non-narcotic pain management in its response to the opioid crisis.²⁸ Federal prosecution of opioid-related crimes focuses on distributors of heroin and fentanyl, including traffickers and “pill-mill” operations;²⁹ prosecution for simple possession is generally not a priority.³⁰ The Drug Enforcement Administration (DEA), as the primary administrator of the Controlled Substances Act (CSA),³¹ adopts and enforces regulations for prescription opioid manufacturers and distributors.³²

On the state level, governments have responded in myriad ways.³³ To address pill-mills and the over-prescription of opioids, states have implemented prescription drug monitoring programs at their health administrative agencies.³⁴ Some states have opted to cover medication-assisted treatment

women); § 501 (allocating funding for outpatient treatment of pregnant and postpartum women in residential treatment programs).

²⁶ 21st Century Cures Act, Pub. L. No. 114-255, § 1003, 130 Stat. 1033, 1045 (2015).

²⁷ LISA N. SACCO, CONG. RSCH. SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES 15 (2014).

²⁸ EXEC. OFF. OF THE PRESIDENT, AN UPDATE ON THE PRESIDENT’S COMMISSION ON COMBATING DRUG ADDICTION AND THE OPIOID CRISIS: ONE YEAR LATER 9–12, 18–19 (2019), <https://www.whitehouse.gov/wp-content/uploads/2019/05/Opioid-Commission-Report-One-Year-Later-20190507.pdf> [<https://perma.cc/T3BH-YSBT>].

²⁹ For example, in April 2019 federal prosecutors announced its largest opioid trafficking enforcement operation to date: the indictment of sixty individuals—primarily medical professionals—selling pain pill prescriptions. Off. of Pub. Aff., U.S. Dep’t. of Just., Press Release, *Second Appalachian Region Prescription Opioid Strikeforce Takedown Results in Charges Against 13 Individuals, Including 11 Physicians* (Sept. 24, 2019), <https://www.justice.gov/opa/pr/second-appalachian-region-prescription-opioid-strikeforce-takedown-results-charges-against-13> [<https://perma.cc/D3ZB-NZWJ>]; see also Campbell Robertson, *Doctors Accused of Trading Opioid Prescriptions for Sex and Cash*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/us/doctor-arrested-prescription-drugs.html> [<https://perma.cc/MT6M-7E6M>].

³⁰ *United States v. Safehouse*, No. 19-519, 2020 U.S. Dist. LEXIS 110549, at *19–20 (E.D. Pa. June 24, 2020) (“Widespread prosecution of simple possession has only occurred in tandem with other law enforcement initiatives, such as border control strategies. In 2019, nationwide, there were only 560 federal cases brought for simple possession, and 243 of those emanated from just two districts, one in a border stateWhen the federal government does choose to prosecute it, simple possession is a misdemeanor for a first-time offender, and, except for offenses involving unlawful entry, it results in probation or a fine more than seventy percent of the time.”) (citation omitted); Rachel L. Rothberg & Kate Stith, *The Opioid Crisis and Federal Criminal Prosecution*, 46 J. L., MED. & ETHICS 292, 296–97 (2018) (“Traditionally, the U.S. Attorney’s Offices – along with the federal government itself – have not dedicated their limited resources to prosecuting simple possession of heroin . . . [and] have not sought to prosecute drug-dependent users who simply sell some of the substance to support their habit. Rather, U.S. Attorney’s Offices have typically focused on the seizure of drug transshipments and prosecution of major distributors . . .”).

³¹ U.S. Dep’t of Just., Practitioner’s Manual: An Informational Outline of the Controlled Substances Act 4 (2006), http://www.legalsideofpain.com/uploads/pract_manual090506.pdf [<https://perma.cc/8XTF-Q9MN>].

³² For an overview of the federal government’s measures to punish opioid-related crimes, see Edgar Aliferov, *The Role of Direct-Injury Government-Entity Lawsuits in the Opioid Litigation*, 87 FORDHAM L. REV. 1141, 1151–52 (2018).

³³ See generally Andrew M. Parker et al., *State Responses to the Opioid Crisis*, 46 J. L., MED. & ETHICS 367 (2018).

³⁴ See, e.g., *New Jersey Prescription Monitoring Program*, N.J. DEP’T. OF HEALTH, https://www.state.nj.us/health/populationhealth/opioid/opioid_pmp.shtml [<https://perma.cc/44TZ-HCN3>] (last visited Sept. 27, 2020); *Maryland Prescription*

for opioid addiction under their state Medicaid plans.³⁵ States have also increased access to naloxone and implemented clean needle and syringe exchange programs.³⁶ To encourage use of emergency services during an overdose, state-level “Good Samaritan” laws immunize people from prosecution for drug possession when they call for help.³⁷

Scholars and public health professionals have called for these and other harm reduction approaches to the opioid epidemic. Harm reduction is a catch-all term for interventions that aim to improve health outcomes by minimizing risks and lessening adverse effects of drug use.³⁸ Harm reduction began in the 1980s as a grassroots effort to limit the spread of HIV and hepatitis B.³⁹ Implicit in a harm reduction approach to drug use is not criminalizing “low-level” drug users who are dealing with substance use disorder.⁴⁰ Instead, addiction is treated as a disease and a public health concern, such that health and safety outcomes are prioritized over criminal prosecution.

The call for harm reduction approaches to the opioid epidemic is undoubtedly entangled with the framing of opioid use as a “white” problem. Whites are more likely to be prescribed opioids than non-white racial groups.⁴¹ Once opioid addiction and opioid-related overdose began to ravage white communities and effect a measurable decrease on white life expectancy, policymakers

Drug Monitoring Program, MD. DEP'T. OF HEALTH, <https://bha.health.maryland.gov/pdmp/Pages/Home.aspx> [<https://perma.cc/BKF7-LD3Z>] (last visited Sept. 27, 2020); see generally *State Successes*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/policy/successes.html> [<https://perma.cc/CS9D-E39H>] (last updated July 29, 2019).

³⁵ Parker et al., *supra* note 33, at 371.

³⁶ See *infra* Parts II.A-B.

³⁷ See *Medications to Treat Opioid Use Disorder Research Report*, NAT'L INST. ON DRUG ABUSE 24 (June 2018), <https://www.drugabuse.gov/download/21349/medications-to-treat-opioid-use-disorder-research-report.pdf?v=99088f7584dac93ddcfa98648065bfbe> [<https://perma.cc/ZEU7-H8SK>].

³⁸ See generally Diane E. Logan & G. Alan Marlatt, *Harm Reduction Therapy: A Practice-Friendly Review of Research*, 66 J. CLINICAL PSYCH. 201 (2010) (explaining how harm reduction interventions are used in a variety of clinical settings).

³⁹ Gerry V. Stimson & Pat O'Hare, *Harm Reduction: Moving Through the Third Decade*, 21 INT'L J. DRUG POL'Y 91, 91 (2010).

⁴⁰ See *Harm Reduction*, DRUG POL'Y ALL., <https://www.drugpolicy.org/issues/harm-reduction> [<https://perma.cc/2EXL-FGBZ>] (last visited Sept. 27, 2020) (“Harm reduction stands in stark contrast to a punitive approach to problematic drug use—it is based on acknowledging the dignity and humanity of people who use drugs and bringing them into a community of care in order to minimize negative consequences and promote optimal health and social inclusion.”).

⁴¹ Helena Hansen & Julie Netherland, *Is the Prescription Opioid Epidemic a White Problem?*, 106 AM. J. PUB. HEALTH 2127, 2128 (2016). Whites' greater access to prescription opioids is at least partially explained by better access to insurance coverage and medical care. *Id.* Non-white patients with similar access to medical care as white patients tend to be less likely to be prescribed opioids. *Id.* Racial disparities in pain management have been attributed to prescribers' racial bias and to more aggressive marketing of prescription opioids in white rural areas. See Keturah James & Ayana Jordan, *The Opioid Crisis in Black Communities*, 46 J. L., MED. & ETHICS 404, 408 (2018); Austin Frakt & Toni Monkovic, *A 'Rare Case Where Racial Biases' Protected African-Americans*, N.Y. TIMES (Dec. 2, 2019), <https://www.nytimes.com/2019/11/25/upshot/opioid-epidemic-blacks.html> [<https://perma.cc/VY8N-KFUH>]. The racial gap in opioid-related deaths shows signs of narrowing in the last two years. Agency for Healthcare Res. & Quality, U.S. Dep't of Health & Hum. Serv., *Blacks Experiencing Fast-Rising Rates of Overdose Deaths Involving Synthetic Opioids Other than Methadone* (Feb. 2020), <https://www.ahrq.gov/sites/default/files/wysiwyg/research/findings/nhqrdtr/dataspotlight-opioid.pdf> [<https://perma.cc/E4HJ-LA3P>].

responded with nonpunitive measures.⁴² The War on Drugs, by contrast, criminalized drug addiction and penalized Black drug users much more than white drug users, while drug policy proposals for disproportionately white opioid users typically take a more humane, public health based approach.⁴³

II. HARM REDUCTION BEGINS AT THE LOCAL LEVEL

Local governments are especially and uniquely equipped to accomplish harm reduction. Local governments are on the frontlines of the opioid crisis and its effects.⁴⁴ Municipal police and emergency services respond to overdoses. In cities, behavioral health departments provide addiction recovery services and helplines. Local parks—even Little League baseball parks—have become sites for intravenous drug users to inject, and for municipal recreation departments to clean up.⁴⁵

The opioid crisis, while often associated with rural communities,⁴⁶ has had a major impact on urban centers, where residents are concentrated and where opioids are trafficked along major highway routes to buyers in cities. Trafficking patterns channel opioids to cities in the Northeast, creating a distribution highway.⁴⁷ Cities, as concentrated governing bodies dealing with residents in crisis, are quicker on the uptake with harm reduction initiatives than states. At the local level, city governments can collect input from harm reduction advocates and test out nonpunitive harm reduction strategies. Harm reduction, especially when taken up in lieu of criminalization, requires coordination among police, emergency responders, prosecutors, and public health departments. Such multifaceted coordination is piloted most seamlessly within a locality. Cities also have the legal might

⁴² Hansen & Netherland, *supra* note 41.

⁴³ See generally James & Jordan, *supra* note 41 (explaining how the framing of the opioid epidemic as an issue mainly facing white communities ignores the impact of the epidemic on Black communities and perpetuates the disparate treatment they receive). For an overview of the anti-Black motivation for, and racially disparate impact of, the War on Drugs, see MICHELLE ALEXANDER, *THE NEW JIM CROW* 97–101 (2010).

⁴⁴ See Scott Burris et al., *Federalism, Policy Learning, and Local Innovation in Public Health: The Case of the Supervised Injection Facility*, 53 ST. LOUIS U. L.J. 1089, 1107–08 n.96 (2009) [hereinafter Burris et al., *Federalism*] (citing Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 256–57 (2004)) (discussing how city and county governments bear the brunt of the burden of service delivery and emergency response to drug abuse and may be best able to judge the necessity and effectiveness of locally implemented interventions).

⁴⁵ See, e.g., Kate Zernike, *To Fight Crime, a Poor City Will Trade In Its Police*, N.Y. TIMES (Sept. 28, 2012), <https://www.nytimes.com/2012/09/29/nyregion/overrun-by-crime-camden-trades-in-its-police-force.html> [<https://perma.cc/9393-S4Y9>] (covering heroin use in public parks in Camden, New Jersey).

⁴⁶ See, e.g., Katherine M. Keyes et al., *Understanding the Rural–Urban Differences in Nonmedical Prescription Opioid Use and Abuse in the United States*, 104 AM. J. PUB. HEALTH e52, e52 (2014) (“[D]eath and injury from nonmedical prescription opioid misuse are concentrated in states with large rural populations, such as Kentucky, West Virginia, Alaska, and Oklahoma. . . . [I]ndividuals in counties outside metropolitan areas have higher rates of drug poisoning deaths, including deaths from opioids, and opioid poisonings in nonmetropolitan counties have increased at a rate greater than threefold the increase in metropolitan counties.”). While “rural” describes geographic concentration, it is also racially tinged, drawing a distinction between rural/white and urban/Black. Christine Minhee & Steve Calandrillo, *The Cure for America’s Opioid Crisis? End the War on Drugs*, 42 HARV. J.L. & PUB. POL’Y 542, 568–70, 575, 577 (2019).

⁴⁷ See Rebecca D. O’Brien and Thomas Mashberg of *The Record*, *Woodland Park, NJ*, THE PULITZER PRIZES, <https://www.pulitzer.org/finalists/rebecca-d-obrien-and-thomas-mashberg> [<https://perma.cc/C9WR-HCEA>] (last visited Sept. 28, 2020) (aggregating a full series of investigative pieces from *The Record* on the New Jersey heroin trade).

to face off challenges from state and federal governments.

Once a harm reduction policy is workshopped in localities, it can be adopted as statewide policy. As the controversy surrounding a policy diminishes over time, its effectiveness can be measured. For instance, localities led the charge on such initiatives as public smoking bans, environmental protection, and civil rights.⁴⁸ Such initiatives were not without controversy and legal opposition.⁴⁹ This *cities-as-laboratories* policy device is particularly important for developing harm reduction solutions to the opioid crisis that present viable alternatives to the federal government's more punitive approach to drug use. Syringe exchanges and naloxone availability provide two such illustrations.

A. Syringe exchange programs

Syringe exchange programs (SEPs), also known as needle exchanges, are emblematic of a harm reduction strategy effectuated at the local level to the chagrin of state and federal officials. SEPs provide clean needles and syringes for intravenous drug users to reduce the risk of infection and disease transmission.⁵⁰ Private charitable organizations opened the first U.S. SEP in 1988 in Tacoma, Washington as a harm reduction response to the HIV epidemic.⁵¹ SEPs were legally risky because they involved the distribution of drug paraphernalia. Throughout the mid-twentieth century, states enacted "head shop" laws based on the DEA's Model Drug Paraphernalia Act.⁵² Under these laws, which were designed to prosecute sellers of rolling papers and freebasing kits, anyone supplying or owning injection equipment could be criminally prosecuted.⁵³ Gradually, more and more cities opened SEPs. By 1995, there were at least 60 SEPs across 21 states, many of them in violation of their states' head shop laws and lacking other legal authorization.⁵⁴

The experience of SEPs in New Jersey illustrates the evolution of harm reduction from private, criminalized activity to local policy, and then to eventual state authorization. New Jersey had a head shop law closely matching the DEA model law but with an additional section to prohibit non-physician, illegitimate distribution of syringes and needles.⁵⁵ In the 1990s, the State of New Jersey

⁴⁸ Burris et al., *Federalism*, *supra* note 44, at 1108–09.

⁴⁹ See, e.g., M.L. Nixon et al., *Tobacco Industry Litigation to Deter Local Public Health Ordinances: The Industry Usually Loses in Court*, 13 TOBACCO CONTROL 65, 66–68 (2004) (discussing industry challenges to local smoking bans where challenges were based on state preemption grounds).

⁵⁰ *Syringe Services Programs (SSPs) Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION 1 (July 19, 2019), <https://www.cdc.gov/ssp/docs/SSP-FactSheet.pdf> [<https://perma.cc/GDW9-E64W>]. SEPs are demonstrably effective at reducing disease spread and connecting drug users into addiction treatment. *Id.*

⁵¹ Scott Burris et al., *Lethal Injections: The Law, Science, and Politics of Syringe Access for Injection Drug Users*, 37 U.S.F. L. REV. 813, 817 (2003).

⁵² *Id.* at 816–17; see generally 21 U.S.C. § 863.

⁵³ *Id.*

⁵⁴ *Id.* at 817–18 (citing Ctrs. for Disease Control & Prevention, *Syringe Exchange Programs—United States, 1994–1995*, 44 MORBIDITY & MORTALITY WKLY. REP., Sept. 22, 1995, at 684 (1995)).

⁵⁵ State *ex rel.* Atl. Cty. Prosecutor v. City of Atl. City, 879 A.2d 1206, 1208 (N.J. Super. Ct. App. Div. 2005) (citing N.J. STAT. ANN. § 2C:36-6). Under this statute, privately run SEPs in New Jersey faced criminal sanctions. State v. McCague, 714 A.2d 937 (N.J. Super. Ct. App. Div. 1998); *cf.* Commonwealth v. Leno, 616 N.E.2d 453 (Mass. 1993) (upholding criminal

pursued successful criminal convictions under the head shop law against community organizers distributing syringes and needles in several cities in the state.⁵⁶ In 2004, the local government of Atlantic City established a SEP by city ordinance to reduce the spread of HIV and Hepatitis C.⁵⁷ Atlantic City's SEP ordinance was defeated in state court,⁵⁸ but the New Jersey legislature gave SEPs the green light just two years later.⁵⁹

Likewise, in New York, a privately-run SEP faced criminal charges but evaded them, having successfully argued a necessity defense.⁶⁰ One year later, the state's health department adopted regulations authorizing a needle exchange program.⁶¹ In Illinois, SEPs operated under a creative "research" exemption to the state head shop law⁶² until they became specifically authorized under state statute in 2019.⁶³ Prevention Point, an SEP in Philadelphia, began as an underground effort in 1991 before operating in the open under a 1992 mayoral executive order.⁶⁴ Efforts to legalize SEPs in Pennsylvania are ongoing.⁶⁵

Where state governments are willing to authorize SEPs, local government cooperation is still paramount and functionally dispositive of whether the SEP will be successfully implemented. In Scott County, Indiana, a large outbreak of HIV among intravenous drug users in 2015 prompted the state to authorize SEPs under limited circumstances.⁶⁶ Localities, however, were not always on cooperative. County councils defunded and shut down state-authorized SEPs, citing concerns about abetting drug use.⁶⁷ Police officers voiced their opposition to syringe distribution efforts because they undermined

charges for private needle exchange under state law that prohibited the distribution of hypodermic needles without a prescription).

⁵⁶ State v. Sorge, 591 A.2d 1382 (N.J. Super. Ct. 1991); *McCague*, 714 A.2d at 937.

⁵⁷ *State ex rel. Atl. Cty. Prosecutor*, 879 A.2d at 1207.

⁵⁸ *Id.*

⁵⁹ Bloodborne Disease Harm Reduction Act, ch. 99, 2006 N.J. Laws 928 (codified at N.J. STAT. ANN. §§ 26:5C-25 to -31 (West 2016)). For a review of the effectiveness of SEPs in New Jersey, see MARY E. O'DOWD, N.J. DEPT OF HEALTH, NEW JERSEY SYRINGE ACCESS PROGRAM DEMONSTRATION PROJECT: FINAL REPORT 7-10 (2012), https://www.drugpolicy.org/sites/default/files/nj-doh-sap-final-report-2012_0.pdf [<https://perma.cc/XNY6-2GFD>].

⁶⁰ People v. Bordowitz, 588 N.Y.S.2d 507 (N.Y. Crim. Ct. 1991).

⁶¹ N.Y. COMP. CODES R. & REGS. tit. 10, § 80.135 (2020); People v. Monroe, 593 N.Y.S.2d 742, 743-44 (N.Y. Crim. Ct. 1992).

⁶² 720 ILL. COMP. STAT. ANN. 635/1(a) (West 2019); People v. Presa, 24 N.E.3d 155 (Ill. App. Ct. 2014).

⁶³ Act of Aug. 9, 2019, S.B. 1828, § 200, 2019 Ill. Legis. Serv. (West) (amending 720 ILL. COMP. STAT. ANN. 635/1 (West 2019)).

⁶⁴ *History of PPP*, PREVENTION POINT, <https://ppponline.org/about-us/history-ppp> [<https://perma.cc/7283-SJWU>] (last visited Sept. 8, 2020).

⁶⁵ Aneri Pattani, *Syringe Exchanges Deemed 'Life-Sustaining' During Pa. Coronavirus Shutdown, Raising Hopes for Eventual Legislation*, PITTSBURGH POST-GAZETTE (Mar. 30, 2020), <https://www.post-gazette.com/news/health/2020/03/30/syringe-exchanges-pa-prevention-point-pittsburgh-needles-covid-19-addiction-services/stories/202003300062> [<https://perma.cc/NDN8-C6U3>].

⁶⁶ Nicholas Golding, *The Needle and the Damage Done: Indiana's Response to the 2015 HIV Epidemic and the Need to Change State and Federal Policies Regarding Needle Exchanges and Intravenous Drug Users*, 14 IND. HEALTH L. REV. 173, 189-90 (2017).

⁶⁷ Giles Bruce, *Conservative Indiana Adopted Needle Exchanges but Still Faces Local Resistance*, KAISER HEALTH NEWS (Feb. 12, 2020), <https://khn.org/news/conservative-indiana-adopted-needle-exchanges-but-still-faces-local-resistance>

the policing responsibility to enforce laws prohibiting possession and intent to inject controlled substances.⁶⁸ West Virginia has had similar decreases in SEP availability due to local backlash.⁶⁹ Local police can also undermine SEP efforts by targeting people who lawfully use SEP services. In Bridgeport, Connecticut, the local police repeatedly harassed and arrested drug users for lawfully possessing injection equipment they had received from their SEP and stopped only when a class of users secured a permanent injunction in federal court.⁷⁰

Privately funded SEPs are unlikely to last without tacit cooperation from their respective local government, which can otherwise mount a legal challenge. Some states that authorize SEPs condition that authorization on local approval.⁷¹ But even when such approval is not statutorily required, a local government can still bar implementation of a private SEP by withholding approval on various pretexts. For example, in Belleville, Illinois, the city government successfully challenged a proposed SEP at an HIV care facility for improper zoning.⁷² The facility was in a “light industrial” zone, but the city denied approval on the basis that the SEP failed to allege sufficiently specific facts about how it “packed the pharmaceuticals,” i.e. the syringes, “in some way” that would allow it to claim a permitted “packing” use in the district.⁷³ While some localities, like the counties in Indiana, make their opposition to SEPs known by withholding public health money, the Belleville case illustrates the subtler legal lengths to which a locality can stretch to block even a private SEP.

B. Naloxone availability and overdose response training

Local governments have also led the charge in equipping residents with naloxone and training them to identify and treat overdoses.⁷⁴ The importance of municipalities’ roles in advancing naloxone availability is less obvious than for SEPs because it is generally less controversial, facing negligible opposition from state governments. Every state has taken steps to expand naloxone access.⁷⁵ In most states, this is accomplished by a standing order to give a prescription for naloxone

[<https://perma.cc/2LV6-XXUK>].

⁶⁸ *Id.*; Jordan Morey, *County Health Department, Local Law Enforcement Debate Harm Reduction Service*, THE TRIBUNE (Dec. 20, 2019, 11:46 AM), http://www.tribtown.com/2019/12/20/county_health_department_local_law_enforcement_debate_harm_reduction_service/ [<https://perma.cc/Z26Z-5RTA>].

⁶⁹ Bruce, *supra* note 67.

⁷⁰ *Doe v. Bridgeport Police Dep’t*, 198 F.R.D. 325, 330, 350 (D. Conn. 2001); *see also* L.B. v. Town of Chester, 232 F. Supp. 2d 227, 231 (S.D.N.Y. 2002) (describing the arrest of a lawful possessor of hypodermic needles without probable cause).

⁷¹ Melissa Vallejo, Note, *Safer Bathrooms in Syringe Exchange Programs: Injecting Progress into the Harm Reduction Movement*, 118 COLUM. L. REV. 1185, 1198–99 (2018).

⁷² *City of Belleville v. Bethany Place*, No. 5-13-0363, 2014 WL 4415237 (Ill. App. Ct. Sept. 8, 2014). For a discussion on the racist and segregationist history of modern zoning ordinances, *see* RICHARD ROTHSTEIN, *THE COLOR OF LAW* 39–57 (2017).

⁷³ *Bethany Place*, 2014 WL 4415237, at *2–3.

⁷⁴ For an overview of naloxone distribution to laypersons, *see* Eliza Wheeler et al., Ctrs. for Disease Control & Prevention, *Opioid Overdose Prevention Programs Providing Naloxone to Laypersons—United States, 2014*, 64 MORBIDITY & MORTALITY WKLY. REP., June 19, 2015, at 631.

⁷⁵ AM. MED. ASS’N, NATIONAL ROADMAP ON STATE-LEVEL EFFORTS TO END THE OPIOID EPIDEMIC: LEADING-EDGE PRACTICES AND NEXT STEPS 21 (2019), <https://end-overdose-epidemic.org/wp-content/uploads/2020/05/AMA->

to everyone in the jurisdiction.⁷⁶ States can also authorize pharmacists to prescribe naloxone directly, such that a naloxone purchase resembles an over-the-counter purchase.⁷⁷ Even the federal government, which is typically bellicose on issues of harm reduction, has been unopposed to the states' sanction of naloxone.⁷⁸

When it comes to actualizing naloxone availability, however, standing orders fall short. In practice, access to naloxone varies. Individual purchasers are a small proportion of naloxone sales,⁷⁹ which suggests that standing orders and pharmacist authorizations account little for increasing naloxone access. Moreover, audit studies reveal that a minority of pharmacies actually stock naloxone and provide accurate information about its availability.⁸⁰

As a result, the work of getting naloxone in the hands of people who need it falls on harm reduction advocates and local governments. There is strong evidence that local opioid education and naloxone distribution programs are working to reduce overdose deaths.⁸¹ Equipping police officers

Manatt-National-Roadmap-September-2019-FINAL.pdf [https://perma.cc/7SCG-8ZGJ].

⁷⁶ See NAT'L INST. ON DRUG ABUSE, MEDICATIONS TO TREAT OPIOID USE DISORDER RESEARCH REPORT 24 (2018), <https://www.drugabuse.gov/publications/research-reports/medications-to-treat-opioid-addiction/naloxone-accessible> [https://perma.cc/6SGN-ARZB]; Janet Weiner et al., *Expanding Access to Naloxone: A Review of Distribution Strategies*, PENN LEONARD DAVIS INST. OF HEALTH ECON. 3 (May 29, 2019), <https://ldi.upenn.edu/brief/expanding-access-naloxone-review-distribution-strategies> [https://perma.cc/MY5P-TM9V] ("Most states have passed laws that allow pharmacists to dispense naloxone under a standing order, which does not require a physician's prescription.")_A city health commissioner or other licensed public health official may also give such a standing order, but that power comes from the state's authorization of licensed providers to prescribe naloxone by standing order. See Weiner et al., *supra* note 76 ("At least 23 states have issued statewide standing orders by a physician-official, while 24 others allow jurisdictions to pass standing order laws."); see, e.g., MD. CODE ANN., HEALTH-GEN § 13-3103(c) (West 2017) (allowing individuals without training and education in opioid overdose response to obtain naloxone); MD. CODE ANN., HEALTH-GEN § 13-3106(b)(1) (West 2017) (allowing a licensed health care provider employed by the state or local health departments to prescribe and dispense naloxone by issuing a standing order); Press Release, Baltimore City Health Dep't, Baltimore City Health Commissioner Signs New Standing Order for Opioid Overdose Reversal Medication (June 1, 2017), <https://health.baltimorecity.gov/news/press-releases/2017-06-01-baltimore-city-health-commissioner-signs-new-standing-order-opioid> [https://perma.cc/Z7UC-MXLD].

⁷⁷ See Weiner et al., *supra* note 76 ("Nine states give pharmacists direct authority to prescribe and sell naloxone to the public.").

⁷⁸ See, e.g., 21st Century Cures Act, *supra* note 26. The Trump administration has shown support for naloxone availability. In April 2018, the Surgeon General issued an "advisory" encouraging individuals to obtain and carry naloxone. EXEC. OFF. OF THE PRESIDENT, *supra* note 28, at 17.

⁷⁹ See Weiner et al., *supra* note 76, at 1 ("About 83% of naloxone units were sold to non-retail settings of care, such as hospitals and clinics, health departments, and institutions that supply first responders, emergency medical services, and community groups. Seventeen percent of sales were to retail and mail-order/specialty pharmacies. . . . The retail setting accounted for a small but growing proportion of total naloxone dispensing.").

⁸⁰ *Id.*

⁸¹ See, e.g., Alexander Y. Walley et al., *Opioid Overdose Rates and Implementation of Overdose Education and Nasal Naloxone Distribution in Massachusetts: Interrupted Time Series Analysis*, BMJ, Feb. 9, 2013, at 1 (presenting a comparative study of nineteen Massachusetts localities with overdose education and naloxone distribution programs which showed a reduction in opioid overdose death); Eliza Wheeler et al., Ctrs. for Disease Control & Prevention, *Community-Based Opioid Overdose Prevention Programs Providing Naloxone—United States 2010*, 61 MORBIDITY & MORTALITY WKLY. REP., Feb. 17, 2012, at 101, 103 (finding that community-based programs have resulted in over ten thousand overdose reversals); see also Margaret Lowenstein et al., *Overdose Awareness and Reversal Trainings at Philadelphia Public Libraries*, AM. J. HEALTH PROMOTION, July 14, 2020, at 1 (finding improved

with naloxone, another local government policy decision, is a potentially important means of naloxone dispersal.⁸² Most police officers do not carry naloxone—it is up to localities and police departments to budget for it.⁸³ Even in major cities like Chicago and Seattle, whether or not officers carry naloxone is based on where they patrol, leaving many without it.⁸⁴ Like for SEPs, the role of localities is essential to the effectiveness of naloxone distribution as a harm reduction policy.

III. SAFE INJECTION FACILITIES AS LOCAL HARM REDUCTION

Like other harm reduction policy proposals to address the opioid crisis, SIFs are incubating at the local level of government. An SIF or, more euphemistically, an overdose prevention site or community health engagement location (CHEL), is a place where intravenous drug users can consume drugs under medical supervision.⁸⁵ Medical personnel can intervene with overdose-reversal medication like naloxone and provide information about treatment for opioid addiction and general social services. Sites in Canada, Australia, and Europe have reported notable successes with reducing opioid overdose deaths and connecting users with treatment.⁸⁶ SIFs have even received the attention and endorsement of the American Medical Association.⁸⁷

Although no SIF operates in any official capacity in the United States,⁸⁸ plans are underway. Seattle has allocated funding and established a working group to locate a site.⁸⁹ Burlington,⁹⁰

opioid response readiness from post-training surveys at local overdose trainings).

⁸² See Corey S. Davis et al., *Expanded Access to Naloxone Among Firefighters, Police Officers, and Emergency Medical Technicians in Massachusetts*, 104 AM. J. PUB. HEALTH e7 (2014) (describing how police officers are often the first ones to reach the scene of an overdose, and often more prevalent throughout cities, enabling them to administer naloxone more quickly than other first responders).

⁸³ Mattie Quinn, *Most Police Still Don't Carry the Drug That Reverses an Opioid Overdose*, GOVERNING (May 2019), <https://www.governing.com/topics/public-justice-safety/gov-naloxone-police-officers-cities.html> [<https://perma.cc/M2TN-FASG>].

⁸⁴ *Id.*

⁸⁵ Alex Kreit, *Safe Injection Sites and the Federal "Crack House" Statute*, 60 B.C. L. REV. 413, 416 (2019).

⁸⁶ European Monitoring Centre for Drugs and Drug Addiction, *Drug Consumption Rooms: An Overview of Provision and Evidence* 5–6 (2018), https://www.emcdda.europa.eu/system/files/publications/2734/POD_Drug%20consumption%20rooms.pdf [<https://perma.cc/KX27-LA4P>]; S.F. DEP'T OF PUB. HEALTH, HARM REDUCTION SERVICES IN SAN FRANCISCO ISSUE BRIEF 15–20 (June 2017), <https://www.sfdph.org/dph/files/SIStaskforce/IssueBrief-06202017.pdf> [<https://perma.cc/RYE7-54DF>].

⁸⁷ Press Release, Am. Med. Ass'n, AMA Wants New Approaches to Combat Synthetic and Injectible Drugs (June 12, 2017), <https://www.ama-assn.org/press-center/press-releases/ama-wants-new-approaches-combat-synthetic-and-injectable-drugs> [<https://perma.cc/G6XW-XP9J>].

⁸⁸ There are reports of one secret, unsanctioned site operating in an undisclosed location in the United States. Alex H. Kral & Peter J. Davidson, *Addressing the Nation's Opioid Epidemic: Lessons from an Unsanctioned Supervised Injection Site in the U.S.*, 53 AM. J. PREVENTIVE MED. 919 (2017). Some existing SEPs are starting to resemble SIFs in that they provide safety measures in their bathrooms for drug users, such as an intercom system to check for users' consciousness every three minutes. See Vallejo, *supra* note 71, at 1202–04.

⁸⁹ N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, OVERDOSE PREVENTION IN NEW YORK CITY: SUPERVISED INJECTION AS A STRATEGY TO REDUCE OPIOID OVERDOSE AND PUBLIC INJECTION 41–42 (2018), <https://www.mass.gov/doc/nyc-sif-report-2018/download> [<https://perma.cc/5APE-KG8W>].

⁹⁰ Jess Aloe, *As Heroin Overdoses Rise, Safe Injection Site Considered in Burlington*, BURLINGTON FREE PRESS (July 17, 2018,

Denver,⁹¹ and San Francisco⁹² all passed local ordinances authorizing SIFs, should their state legislatures approve. The mayors of New York City,⁹³ Ithaca,⁹⁴ and Somerville, Massachusetts,⁹⁵ have voiced their interest in opening SIFs. Harm reduction advocates are also organizing in cities like Baltimore⁹⁶ and Portland,⁹⁷ where state legislative approval failed even as municipal governments may permit privately-run SIFs in the future.

In virtually every case, the SIF legality origin story is about municipal governments—city councils open to making a SIF or at least willing to look the other way. Seattle’s plans for an SIF were set in motion by the King County Heroin and Prescription Opiate Addiction Task Force, comprised of city officials, police, emergency services, Native tribe representatives, and behavioral health experts.⁹⁸ In September 2016, the Task Force issued policy recommendations that included piloting

2:12 PM), <https://www.burlingtonfreepress.com/story/news/2018/07/16/burlington-city-council-join-conversation-safe-injection-sites-overdose-heroin-fentanyl/782955002/> [https://perma.cc/KQ9H-7DSN]. A council convened by the governor of Vermont has since expressed serious concerns about authorizing an SIF. Mike Faher, *Safe Injection Sites ‘Not a Viable Option,’ Governor’s Council Says*, VT DIGGER (Oct. 15, 2018), <https://vtdigger.org/2018/10/15/safe-injection-sites-not-a-viable-option-governors-council-says/> [https://perma.cc/SH2B-HZED].

⁹¹ *Denver City Council Passes Ordinance to Create Safe Injection Site*, FOX DENVER (Nov. 27, 2018, 8:34 AM), <https://kdvr.com/news/local/denver-city-council-passes-ordinance-to-create-safe-injection-site/> [https://perma.cc/FY47-EKYF].

⁹² *San Francisco Officials Approve Controversial Safe Injection Sites; Await State Approval*, CBS SF BAY AREA (June 24, 2020, 4:33 AM), <https://sanfrancisco.cbslocal.com/2020/06/24/sf-supes-approve-safe-injection-sites-rehiring-city-workers-laid-off-due-to-pandemic/> [https://perma.cc/TG9X-SQWQ].

⁹³ William Neuman, *De Blasio Moves to Bring Safe Injection Sites to New York City*, N.Y. TIMES (May 3, 2018), <https://www.nytimes.com/2018/05/03/nyregion/nyc-safe-injection-sites-heroin.html> [https://perma.cc/Z2RU-EA7T].

⁹⁴ Shruti Juneja, *Mayor Svante Myrick Calls Upon Cuomo for Approval of Supervised Drug Injection Sites in Ithaca*, CORNELL DAILY SUN (May 16, 2018), <https://cornellsun.com/2018/05/16/mayor-svante-myrick-calls-upon-cuomo-for-approval-of-supervised-drug-injection-sites-in-ithaca/> [https://perma.cc/62QD-ME9N].

⁹⁵ Martha Bebinger & Bob Oakes, *Somerville Mayor Plans to Open a Supervised Consumption Site Next Year*, WBUR (Aug. 14, 2019), <https://www.wbur.org/commonhealth/2019/08/14/curtatone-supervised-illegal-drug-use> [https://perma.cc/B5GW-S62P]. A state-level commission report proposed piloting SIFs in Massachusetts. COMMONWEALTH OF MASS. EXEC. OFF. OF HEALTH & HUMAN SERVICES, THE HARM REDUCTION COMMISSION 15 (Mar. 1, 2019), <https://www.mass.gov/files/documents/2019/03/01/Harm%20Reduction%20Commission%20Report%20%283-1-2019%29.pdf> [https://perma.cc/VQQ6-7TW6]. There are two pieces of SIF legislation in consideration, S.1134, 191st Gen. Ct. (Mass. 2019); H.1712, 191st Gen. Ct. (Mass. 2019). Governor Charlie Baker opposes SIFs. Matt Murphy, State House News Service, *Gov. Baker Cool to Drug Injection Sites Amid U.S. Attorney’s Prosecution Threats*, METROWEST DAILY NEWS (Feb. 27, 2019, 7:16 PM), <https://www.metrowestdailynews.com/news/20190227/gov-baker-cool-to-drug-injection-sites-amid-us-attorneys-prosecution-threats> [https://perma.cc/VK8J-GNYZ].

⁹⁶ Brandon Soderberg, *The Solution to Baltimore’s Overdose Crisis—Safe Consumption Sites*, BALTIMORE BEAT (Nov. 11, 2019), <http://baltimorebeat.com/2019/11/11/the-solution-to-baltimores-overdose-crisis-safe-consumption-sites/> [https://perma.cc/U9DR-WCN7] (“In both 2016 and 2017, Baltimore County Delegate Dan Morhaim introduced a bill that would have made it legal to establish safe consumption sites in Maryland though both years, the bill died in the House.”).

⁹⁷ In May 2017, a SIF proposal before the Maine legislature died in committee. David Harry, *Portland to Consider Safe Injection Site for Drug Users*, PORTLAND PRESS HERALD (Feb. 22, 2018), <https://www.pressherald.com/2018/02/21/portland-to-discuss-safe-injection-site-for-drug-users/> [https://perma.cc/PD95-FH28].

⁹⁸ KING CTY. DEP’T OF COMMUNITY & HUMAN SERVICES, HEROIN AND PRESCRIPTION OPIATE ADDICTION TASK FORCE: FINAL REPORT AND RECOMMENDATIONS 1 (2016), https://kingcounty.gov/~media/depts/community-human-services/behavioral-health-recovery/documents/herointf/Final-Heroin-Opiate-Addiction-Task_Force-Report.ashx?la=en

two community health engagement location (CHEL) sites, one within Seattle and one outside city limits.⁹⁹ Seattle City Council approved implementation and funding,¹⁰⁰ but local opposition delayed CHEL plans.¹⁰¹ A community group opposing the CHEL pursued a ballot initiative to prohibit the use of public funds for a SIF that received over 69,000 voter signatures.¹⁰² The City Council reaffirmed its support for CHELs in November 2017, allocating \$1.3 million of funding in its fiscal year 2018 budget.¹⁰³ At the end of 2018, the ballot initiative was tossed in state court for improper interference with the City Council's budget authority.¹⁰⁴ No site yet exists, but plans are still underway to establish one, possibly as a mobile unit stationed near other behavioral health services.¹⁰⁵

In 2018, San Francisco opened a nonoperative, "pop-up" SIF to showcase the concept to community members and government officials.¹⁰⁶ The showcase coincided with plans underway to open a SIF—the California State Legislature had passed a bill permitting a three-year pilot SIF in San Francisco upon local approval.¹⁰⁷ Then-Governor Jerry Brown vetoed the bill,¹⁰⁸ stalling plans until the next governorship.¹⁰⁹ The San Francisco Board of Supervisors unanimously approved an SIF ordinance in June 2020,¹¹⁰ and a bill has been refiled in the State Assembly.¹¹¹

[<https://perma.cc/4RKM-JKDV>].

⁹⁹ *Id.* at 2.

¹⁰⁰ Associated Press, *Seattle Budget Includes Money for Safe-Injection Site*, KIRO 7 (Nov. 21, 2017, 9:40 AM), <https://www.usnews.com/news/best-states/washington/articles/2017-11-21/seattle-budget-includes-money-for-safe-injection-site> [<https://perma.cc/4M6G-847S>].

¹⁰¹ *Timeline: The Fight for Seattle-Area Injection Sites and Cases Against Them*, KIRO 7 (Oct. 16, 2017, 4:39 PM), <https://www.kiro7.com/news/local/timeline-the-fight-for-seattle-area-injection-sites-and-cases-against-them/625593672/> [<https://perma.cc/HY5Y-WW6P>]. Five other cities in King County preemptively banned SIFs. Sarah Holder, *A Controversial Fix for Overdose Deaths: Safe Injection Sites*, BLOOMBERG: CITYLAB (Sept. 5, 2018, 1:05 PM), <https://www.bloomberg.com/news/articles/2018-09-05/why-san-francisco-opened-a-mock-safe-injection-site> [<https://perma.cc/75NK-K692>].

¹⁰² *Protect Pub. Health v. Freed*, 430 P.3d 640, 642 (Wash. 2018).

¹⁰³ Associated Press, *supra* note 100.

¹⁰⁴ *Protect Pub. Health*, 430 P.3d at 645.

¹⁰⁵ Brandon Macz, *Seattle Looking at Fixed-Mobile Safe Consumption Site Model*, MADISON PARK TIMES (June 8, 2018, 9:30 AM), <https://madisonparktimes.com/MobileContent/News/Top-Stories/Article/Seattle-looking-at-fixed-mobile-safe-consumption-site-model/26/284/31179> [<https://perma.cc/MP38-R6XM>]; Josh Kelety, *Seattle and King County Officials Want a Safe Injection Van*, SEATTLE WEEKLY (June 14, 2018, 2:45 PM), <https://www.seattleweekly.com/news/seattle-and-king-county-officials-want-a-safe-injection-van/> [<https://perma.cc/KLU6-KVB3>].

¹⁰⁶ Holder, *supra* note 101.

¹⁰⁷ AB 186, 2017–18 Reg. Sess. (Cal. 2017).

¹⁰⁸ Press Release, Off. of San Francisco Mayor London Breed, Mayor London Breed on the Veto of AB 186 (Sept. 30, 2018), <https://sfmayor.org/article/statement-mayor-london-breed-veto-ab-186> [<https://perma.cc/85BF-K4DN>].

¹⁰⁹ Governor Newsom has stated that he is "open to" SIFs. Melody Gutierrez, *Bill to Create 'Safe Injection Sites' Won't Happen This Year*, L.A. TIMES (June 18, 2019, 5:00 PM), <https://www.latimes.com/politics/la-pol-ca-safe-injection-sites-stalled-20190618-story.html> [<https://perma.cc/MGX2-2Z8Y>]. In *United States v. Safehouse*, California Attorney General Xavier Becerra joined a multistate amicus brief in support of Safehouse. See Brief of the District of Columbia and the States of California, Delaware, Illinois, Michigan, Minnesota, New Mexico, Oregon, Vermont, and Virginia as Amici Curiae Supporting Respondents, *United States v. Safehouse*, 408 F. Supp. 3d 583 (E.D. Pa. 2019) (No. 20–1422).

¹¹⁰ *San Francisco Officials Approve Controversial Safe Injection Sites; Await State Approval*, *supra* note 92.

Denver's plan to open an SIF encountered difficulties similar to those that occurred in San Francisco. In 2017, Denver public health officials traveled to Seattle and Vancouver to study their opioid crisis responses.¹¹² In 2018, Denver City Council approved an SIF with a 12-1 vote, authorizing a pilot program but without public funding and contingent on state statutory authority.¹¹³ A state-level task force on substance abuse proposed SIF authorization,¹¹⁴ but, according to one state senator, as of 2019 there was not yet enough support in the state legislature.¹¹⁵

The most developed SIF plan in the United States is Philadelphia's Safehouse, a privately funded, nonprofit corporation¹¹⁶ operating without explicit authorization from Philadelphia City Council. Instead, Safehouse directors consulted on the project with stakeholders in city government, including the mayor's office, public and behavioral health officials, and the police department.¹¹⁷ While some councilmembers expressed reservations,¹¹⁸ the council did not preemptively block the Safehouse rollout in 2018. The early formation of Safehouse thus resembles a "discretion-based" approach wherein SEPs operate without formal legal authorization.¹¹⁹

Safehouse's SIF has faced planning challenges similar to the King County, Washington, SIF¹²⁰ and the Belleville SEP:¹²¹ where to put it? Philadelphia Mayor Jim Kenney initially voiced his support for Safehouse as a private entity,¹²² but he subsequently raised concerns about its location. In

¹¹¹ AB 362, 2019-20 Reg. Sess. (Cal. 2019).

¹¹² DENVER DEP'T OF PUB. HEALTH & ENV'T & DENVER HUM. SERV., OPIOID EPIDEMIC COLLECTIVE IMPACT SUMMARY REPORT 3, 8 (2018), <https://www.denvergov.org/content/dam/denvergov/Portals/771/documents/CH/Substance%20Misuse/Opioid%20Impact%20Summary%20Report%20final.pdf> [<https://perma.cc/W969-9CEA>].

¹¹³ *Denver City Council Passes Ordinance to Create Safe Injection Sites*, *supra* note 91; *see generally* Denver, Colo., City Council Bill No. 18-1292 (Nov. 7, 2018).

¹¹⁴ COLO. SUBSTANCE ABUSE TREND AND RESPONSE TASK FORCE, TWELFTH ANNUAL REPORT app. F, at 45 (2018), https://coag.gov/app/uploads/2020/02/TwelfthAnnualSATFR_2018.pdf [<https://perma.cc/3ZTY-L3F8>].

¹¹⁵ *See* Jennifer Brown, *Supervised Injection Site Supporters Aren't Ready to Give Up on the Conversation in Colorado*, THE COLO. SUN (Oct. 4, 2019, 7:05 AM), <https://coloradosun.com/2019/10/04/supervised-injection-site/> [<https://perma.cc/WSB3-9RLU>] ("Sen. Brittany Pettersen, who planned to run the legislation last session but then didn't introduce it because it didn't have enough support, said [] she had no plans to run it next year. 'It's a good first step, but we have a lot of work to do to build enough support in Colorado and the Capitol to pass a bill[.]'").

¹¹⁶ *Who We Are*, SAFEHOUSE, <https://www.safehousephilly.org/who-we-are> [<https://perma.cc/7Q6S-FRQ9>].

¹¹⁷ Aubrey Whelan, *Former Gov. Ed Rendell Is Leading Nonprofit to Open a Safe-Injection Site in Philadelphia*, PHILA. INQUIRER (Oct. 3, 2018), <https://www.inquirer.com/philly/health/addiction/safe-injection-site-philadelphia-ed-rendell-prevention-point-20181002.html> [<https://perma.cc/AF3J-GS6W>]; Press Release, City of Phila., Mayor Kenney Issues Statement on Overdose Prevention Sites (Apr. 18, 2019), <https://www.phila.gov/2019-04-18-mayor-kenney-issues-statement-on-overdose-prevention-sites/> [<https://perma.cc/8UK8-XV94>].

¹¹⁸ Whelan, *supra* note 6.

¹¹⁹ *See generally* Vallejo, *supra* note 71, at 1196–97 ("Some SEPs are not authorized by statute or declaratory judgment. Discretion-based SEPs manage to exist either as underground SEPs or at the discretion of police enforcement and city officials.").

¹²⁰ *See supra* notes 98–105 and accompanying text.

¹²¹ *See supra* notes 72–73 and accompanying text.

¹²² Rebecca Savransky, *Top Philadelphia Officials Voice Support for Opening of Safe-Injection Sites*, THE HILL (Jan. 23, 2018, 3:56 PM), <https://thehill.com/blogs/blog-briefing-room/news/370339-top-philadelphia-officials-voice-support-for-opening>

2019, Safehouse was offered a lease in Kensington, one of Philadelphia's neighborhoods most gravely affected by the opioid epidemic.¹²³ Kenney met with Safehouse directors and urged them to look elsewhere, citing public safety concerns.¹²⁴ One city councilmember proposed legislation to prohibit Safehouse from opening in Kensington,¹²⁵ and most candidates for City Council when polled stated they were opposed to Safehouse or did not respond.¹²⁶

After a federal district court ruled that Safehouse did not violate federal drug laws,¹²⁷ City Council took a more overtly disapproving stance. At Safehouse's subsequent press conference, community members and councilmembers complained that South Philadelphia, the next proposed location, had been blindsided and excluded from decision-making.¹²⁸ One week after Safehouse won the federal challenge, City Council adopted a resolution by 15-2 vote condemning the lack of transparency on Safehouse's location and asking to halt its plans.¹²⁹ To assess the legal viability of SIFs, then, is to understand their genesis and hang-ups at the municipal level. As for other forms of harm reduction, local approval is necessary for the successful realization of SIFs.

of-safe [<https://perma.cc/48ZE-85JY>] ("We don't want [people in addiction] dying on the street and we want to have a place to administer Narcan if necessary."); The City of Philadelphia Law Department filed an amicus brief on behalf of Mayor Kenney and the Health Commissioner in *United States v. Safehouse*. Brief of Amici Curiae Mayor Jim Kenney and Health Commissioner Dr. Thomas Farley, *United States v. Safehouse*, No. 20-1422 (3d Cir. July 6, 2020) (West).

¹²³ Aubrey Whelan, *Before a Supervised Injection Site Opens in Philly, Mayor Kenney Says City Must Address Public Safety*, PHILA. INQUIRER (Apr. 17, 2019), <https://www.philly.com/health/supervised-injection-site-philadelphia-mayor-kenney-20190417.html> [<https://perma.cc/SB38-74KH>].

¹²⁴ *Id.*

¹²⁵ Jake Blumgart, *Councilman Mark Squilla Moves to Block Supervised Injection Site*, WHYY: PLAN PHILLY (Mar. 29, 2019), <http://planphilly.com/articles/2019/03/29/councilman-mark-squilla-moves-to-block-supervised-injection-site> [<https://perma.cc/9LCU-JG4S>].

¹²⁶ Ernest Owens, *Progressives, Your Support for Safe Injection Sites Is 'White Lives Matter' by Another Name*, PHILA. MAG. (Oct. 9, 2019, 1:52 PM), <https://www.phillymag.com/news/2019/10/09/safe-injection-sites-white-progressives/> [<https://perma.cc/8NDJ-J88H>].

¹²⁷ See *infra* Part IV.B.2.

¹²⁸ Michael Tanenbaum, *Safehouse's Plan to Open Overdose Prevention Site in South Philly Sparks Contentious Reaction*, PHILLYVOICE (Feb. 26, 2020), <https://www.phillyvoice.com/safehouse-south-philly-supervised-injection-site-heroin-overdose-prevention-community-protest/> [<https://perma.cc/L29G-QDFW>]; Denise Nakano (@DeniseNakanoTV), TWITTER (Feb. 26, 2020, 2:46 PM), <https://twitter.com/DeniseNakanoTV/status/1232753709790236673> [<https://perma.cc/RKZ2-EVTN>]; *United States v. Safehouse*, No. 19-519, 2020 U.S. Dist. LEXIS 110549, at *7 (E.D. Pa. June 24, 2020) ("Safehouse's attempt to open without meaningful dialogue with the surrounding neighborhood was met with organized opposition supported by various elected officials, and the COVID-19 pandemic came to overshadow the opioid epidemic, understandably becoming the almost singular focus of local authorities."). Neighborhood associations have also expressed their disapproval of the site in amicus briefs to court. Brief of 14 Civic Associations and the Fraternal Order of Police, Lodge 5, as Amici Curiae in Support of the United States' Emergency Motion for a Stay Pending Appeal at 2, *United States v. Safehouse*, 2020 WL 3447775 (E.D. Pa. Mar. 2, 2020) (No. 19-0519), 2020 WL 1650109.

¹²⁹ Phila. City Council Res. No. 200195, Mar. 5 Sess. (Phila. 2020).

IV. THE STATE AND FEDERAL LEGAL HURDLES FOR SIFS

As SEPs and nascent SIFs demonstrate, harm reduction cannot happen without advocates, inside or outside of government, coordinating among municipal leaders, police, and communities to obtain collective buy-in. Once this coordination is achieved at the local level, harm reduction policy can still clash with punitive approaches from state and federal governments. This was evident for SEPs whose sites faced legal challenges under state head shop laws. SIFs have the additional legal quandary of on-site drug use, triggering the attention of federal prosecutors. The federal crack house statute, the Controlled Substances Act of 1970 (CSA), prohibits the use of a facility for the consumption of controlled substances.¹³⁰ Much media attention and scholarly commentary has been devoted to what the CSA means for SIFs. The first federal legal battleground over SIFs is *United States v. Safehouse*, in which Philadelphia's Safehouse secured a favorable declaratory judgment that is now on appeal. The following Sections reviews the legal hurdles SIFs face and legal arguments to overcome those hurdles.

A. The state hurdle: disapproving governors and legislatures

Even with local entities on board, a locality must then consider potential state challenges to its proposed SIF. Most cities with SIF interest have stalled plans until they receive explicit sanction from the state legislature and governor. In New York, Governor Andrew Cuomo quite transparently held off on considering approval of New York City's proposed SIFs until after his 2018 re-election,¹³¹ and he is still concerned about the continued threat of federal lawsuits.¹³² New York City Mayor Bill de Blasio, whose office "punt[ed] on the issue" for several months, maintains that the city needs authorization from the state Health Department before setting up sites.¹³³ Ithaca's mayor also awaits Governor Cuomo's green light.¹³⁴ San Francisco is in a similar position with respect to approval from the State of California.¹³⁵

The easiest path forward for a locality is state-level exemption from criminal liability.¹³⁶ But

¹³⁰ 21 U.S.C. §§ 801-971; *see also infra* Part IV.B.1.

¹³¹ Amanda Eisenberg, *New York Inches Closer to Supervised Injection Sites Despite Threat from Trump Administration*, POLITICO (Dec. 15, 2018, 5:01 AM), <https://www.politico.com/states/new-york/albany/story/2018/12/05/new-york-inches-closer-to-supervised-injection-sites-despite-threat-from-trump-administration-726216> [<https://perma.cc/ED5Z-4GRM>].

¹³² Jake Offenhartz, *Your Governor is Afraid: As Federal Judge OKs Safe Injection Sites, Advocates Await Cuomo's Support*, GOTHAMIST (Oct. 4, 2019, 12:43 PM), <https://gothamist.com/news/your-governor-afraid-federal-judge-oks-safe-injection-sites-advocates-await-cuomos-support> [<https://perma.cc/MNV7-W76H>]; *see also* Caroline Lewis, *NYC Plan for Safe Injection Sites Faces Resistance from Cuomo, Trump*, GOTHAMIST (Feb. 7, 2019, 2:25 PM), <https://gothamist.com/news/nyc-plan-for-safe-injection-sites-faces-resistance-from-cuomo-trump> [<https://perma.cc/7THC-9P2E>] (noting that State Health Commissioner Howard Zucker said that approval of an SIF in New York was delayed in part because he was skeptical it would promote public health).

¹³³ Eisenberg, *supra* note 131.

¹³⁴ *See* Juneja, *supra* note 94.

¹³⁵ *See San Francisco Officials Approve Controversial Safe Injection Sites; Await State Approval*, *supra* note 92.

¹³⁶ Cylas Martell-Crawford, *Safe Injection Facilities: A Path to Legitimacy*, 11 ALB. GOV'T L. REV. 124, 128 (2017).

could New York City or San Francisco pursue a SIF without explicit state-level¹³⁷ permission? A brazen-enough locality could attempt the position that “it is better to ask forgiveness than permission” from its state government.¹³⁸ Declaring a public health emergency within the locality could help legitimize the effort.¹³⁹ In Philadelphia’s case, Safehouse directors opted for private funding and declined to seek an explicit authorizing statute, given that Pennsylvania Governor Tom Wolf vocally opposes the use of public funds for a SIF.¹⁴⁰ To date, no state has passed a law affirmatively allowing a SIF.

If a locality prefers to rely on affirmative legal authority over prosecutorial discretion by the state, it has several legal defenses available in the realm of state delegation of power to localities. Localities can look to state constitutional arguments for the legal authority to conduct their own public health initiatives in the face of crisis. About one-third of state constitutions reference public health.¹⁴¹ In California, municipalities have broad discretionary power to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”¹⁴² In fact, California localities need not limit their ordinances to local affairs. A locality’s ordinance is restricted only by the laws and constitutions of the state and federal governments. While California has a state crack house statute imposing criminal liability for a property owner where the place is maintained “for the purpose of” drug use,¹⁴³ San Francisco could, if faced with prosecution by the state, argue that state law does not preempt its ordinance and that the statute does not apply. To establish its local authority to pass an ordinance authorizing an SIF, San Francisco would argue that the ordinance occupies a different field and has a different purpose from the state crack house statute.¹⁴⁴

In states with home rule statutes, localities enjoy a favorable bent when municipal ordinances face possible preemption by state law. In Pennsylvania, the First Class City Home Rule

¹³⁷ A state government may authorize a SIF by statute, executive order, or administrative rulemaking, depending on allocation of powers. Leo Beletsky et al., *The Law (and Politics) of Safe Injection Facilities in the United States*, 98 AM. J. PUB. HEALTH 231, 233 (2009).

¹³⁸ *State ex rel. Atl. Cty. Prosecutor v. City of Atl. City*, 879 A.2d 1206, 1207 (N.J. Super. Ct. App. Div. 2005) (describing history of Atlantic City authorizing a city SEP without express permission from the state).

¹³⁹ See Martell-Crawford, *supra* note 136, at 129 (“Health emergencies have been declared to justify the use of needle exchange programs for many of the same reasons used to justify SIFs, such as the prevention of HIV/AIDS and to work to curb the . . . heroin epidemic.”). In 2017, President Trump declared the opioid crisis a public health emergency, THE WHITE HOUSE, ENDING AMERICA’S OPIOID CRISIS, <https://www.whitehouse.gov/opioids/> [<https://perma.cc/JM4B-Z4SV>] (last visited Oct. 14, 2020), but this was likely without any intention to change the legal authority of municipalities.

¹⁴⁰ Bobby Allyn, *As Philly Moves Closer to Supervised Injection Site, Gov. Wolf Remains Opposed*, WHYY (Oct. 8, 2018), <https://whyy.org/articles/as-philly-moves-closer-to-supervised-injection-site-gov-wolf-remains-opposed/> [<https://perma.cc/7K34-KTCD>].

¹⁴¹ Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1328 (2010).

¹⁴² CAL. CONST. art. XI, § 7.

¹⁴³ CAL. HEALTH & SAFETY CODE § 11366 (West 1991).

¹⁴⁴ *Cf. Santa Monica Pines, Ltd. v. Rent Control Board*, 35 Cal.3d 858, 868–69 (Cal. 1984) (holding that a Santa Monica rent control law is within its police power because it is distinct from and would not “materially interfere” with the purposes of a state legislation).

Act grants cities authority of local self-government, including “complete powers of legislation and administration in relation to [their] municipal functions.”¹⁴⁵ The Act’s enabling legislation provides that “[a]ll grants of municipal power to municipalities governed by a home rule charter under this subchapter, whether in the form of specific enumeration or general terms, shall be liberally construed in favor of the municipality.”¹⁴⁶ A Pennsylvania city seeking to host a safe injection site, opposite a disapproving state legislature and governor, can argue that authorization for the site is within the municipality’s local power. Preventing opioid overdose death within a locality, the argument goes, is a municipal function. After all, it is the city’s own police forces, public health department, parks department, libraries, street cleaners, and residents who must deal with overdoses and overdose deaths. In Philadelphia, the city has already authorized a clean needle exchange and equipped first responders with naloxone.¹⁴⁷ If the city can provide clean needles and administer naloxone under a home rule structure of legal authority, surely it can use that authority to sanction a space to administer naloxone when it is most critically needed.

States enjoy broad authority to criminalize drug-related activity and preempt local law. The timidity of cities like New York City and San Francisco is understandable. Their legal counsel likely warned of state preemption and costly litigation defending a proposed safe injection site absent the governor’s blessing. But local authority to self-govern and to enact public health initiatives permits cities to proceed without necessarily getting overt state-level authorization. Where a locality disagrees with the state on the legality of an SIF, it should look to state constitutions and home rule statutes as sources of local legal authority.

B. *The federal burdle: The Controlled Substances Act (CSA)*

1. Perspectives on CSA § 856(a) liability

Under what is colloquially known as the crack house statute, the Controlled Substances Act of 1970 (CSA)¹⁴⁸ imposes liability for property owners and lessees of facilities whose purpose is to allow consumption of controlled substances.¹⁴⁹ Heroin is a Schedule I substance, and fentanyl is a Schedule II substance.¹⁵⁰ Federal interference with cities’ plans to open injection sites began in August 2018, with Deputy Attorney General Rod Rosenstein’s *New York Times* op-ed stating that such sites are illegal under federal law.¹⁵¹ U.S. Attorneys across the country have echoed a commitment to

¹⁴⁵ 53 Pa. Stat and Cons Stat. § 13131 (West 2004).

¹⁴⁶ 53 Pa. Stat and Cons Stat. § 2961 (West 1996).

¹⁴⁷ See Prevention Point, Syringe Service Program, <https://ppponline.org/syringe-service-program> [<https://perma.cc/8MBS-V2JC>] (last visited Nov. 28, 2020) (describing syringe exchange services at Philadelphia’s Prevention Point); City of Philadelphia, Combating the opioid epidemic: The City’s response, <https://www.phila.gov/programs/combating-the-opioid-epidemic/the-citys-response> [<https://perma.cc/2NZH-HWSC>] (describing Philadelphia’s distribution of naloxone to first responders).

¹⁴⁸ 21 U.S.C. §§ 801-971 and its implementing regulations, 21 C.F.R. §§ 1300.01–1321.01.

¹⁴⁹ 21 U.S.C. § 856(a)(2).

¹⁵⁰ 21 U.S.C. § 812(c).

¹⁵¹ Rod J. Rosenstein, Opinion, *Fight Drug Abuse, Don’t Subsidize It*, N.Y. TIMES (Aug. 27, 2018), <https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html> [<https://perma.cc/2AZC-MYNS>].

prosecute sites, reiterating this position whenever a locality has brought a site proposal.¹⁵² While sites maintain a bring-your-own-drugs policy and would not violate laws relating to drug possession, distribution, or trafficking, they do appear to, at least according to federal prosecutors, violate the crack house provision:

[I]t shall be unlawful to . . . manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.¹⁵³

Scholars and commentators have examined what the CSA may mean for SIFs. Some see federal criminality as a given, with the only paths forward being prosecutorial discretion or a change in the law.¹⁵⁴ Others identified legal arguments an SIF could make to protect it from liability. Scott Burris and his colleagues have reviewed local and state authority to open an SIF as well as statutory interpretation and constitutional arguments to fend off federal charges.¹⁵⁵ Alex Kreit has also analyzed at length the legality of SIFs in the face of the CSA.¹⁵⁶ They both argue that, beyond hoping for the federal government to exercise restraint, SIFs have salient legal defenses.

¹⁵² E.g., Press Release, U.S. Attorney's Office, District of Massachusetts, Statement from U.S. Attorney Lelling Regarding Drug Injection Sites (Oct. 3, 2019), <https://www.justice.gov/usao-ma/pr/statement-us-attorney-elling-regarding-drug-injection-sites> [<https://perma.cc/B3AM-8BR4>] (stating that "efforts to open injection facilities . . . will be met with federal enforcement"); Press Release, U.S. Attorney's Office, District of Colorado, Joint Statement of the U.S. Attorney's Office and the Denver Field Office of the Drug Enforcement Administration Regarding the City and County of Denver's Proposal to Create Supervised Locations to Inject Heroin and Other Illegal Drugs (Dec. 4, 2018), <https://www.justice.gov/usao-co/pr/joint-statement-us-attorney-s-office-and-denver-field-office-drug-enforcement> [<https://perma.cc/65XP-275J>] (stating that operating such sites violates federal law); Press Release, U.S. Attorney's Office, District of Vermont, Statement of the U.S. Attorney's Office Concerning Proposed Injection Sites, <https://www.justice.gov/usao-vt/pr/statement-us-attorney-s-office-concerning-proposed-injection-sites> [<https://perma.cc/NU85-474F>] (stating that sites would "encourage and normalize heroin use" and violate federal law); Shannon Lin, *US Attorney Threatens Legal Action if San Francisco Opens Supervised Injection Sites*, KQED (Mar. 4, 2020), <https://www.kqed.org/news/11804290/us-attorney-threatens-legal-action-if-san-francisco-opens-supervised-injection-sites> [<https://perma.cc/AY6C-9KYR>] (stating that the U.S. Attorney's Office will respond to a San Francisco proposal to open supervised drug injection sites by enforcing federal law); Mike Carter, *Seattle's New U.S. Attorney Says He Won't Allow City to Open Safe-Injection Site*, SEATTLE TIMES (Apr. 3, 2019, 5:49 PM), <https://www.seattletimes.com/seattle-news/seattles-new-u-s-attorney-says-he-wont-allow-city-to-open-safe-injection-site/> [<https://perma.cc/G7SZ-RR8N>] (reporting that U.S. Attorney Brian Morton will "not allow a safe injection site for illicit drugs to open in [Seattle]").

¹⁵³ 21 U.S.C. § 856(a)(2).

¹⁵⁴ E.g., Editorial, *Let Cities Open Safe Injection Sites*, N.Y. TIMES (Feb. 24, 2018), <https://www.nytimes.com/2018/02/24/opinion/sunday/drugs-safe-injection-sites.html> [<https://perma.cc/21NK-7Q5Q>]; Martell-Crawford, *supra* note 136, at 135 ("[C]ase law suggests that a federal challenge to state laws in the realm of health and the Controlled Substance Act tips in favor of the federal government, vitiating state law.") (citing *Gonzales v. Raich*, 545 U.S. 1 (2005)); Anna M. Bonventre, Comment, *Injecting the Solution or Encouraging the Epidemic: The Legality of Safe Injection Sites and the Healthcare Professionals Duty of Non-Maleficence*, 12 ALB. GOV'T L. REV. 1, 9 (2018) ("[T]hese sites would not be legal under federal drug laws.").

¹⁵⁵ Burris et al., *Federalism*, *supra* note 44, at 1089.

¹⁵⁶ Kreit, *supra* note 85, at 413.

First, SIFs could advocate for a narrow reading of the CSA that requires the property owner to have specific intent to store, distribute, manufacture, or use drugs.¹⁵⁷ The Eighth Circuit considered and rejected such an argument in *United States v. Tebeau*.¹⁵⁸ There, the defendant, who owned land used for music festivals, was charged under 21 U.S.C. § 856(a)(2) after an investigation uncovered drug use and drug sales at the festivals.¹⁵⁹ He argued that his mere knowledge of drug use and drug sales was not sufficient to violate § 856(a)(2) absent the specific intent to engage in the forbidden drug-related conduct.¹⁶⁰ But the Eighth Circuit held that specific intent was not required and the statute required only the purpose of maintaining property, not the purpose of drug activity.¹⁶¹ Several circuit courts had previously arrived at a similar interpretation by construing the statute narrowly.¹⁶² They reasoned that to read § 856(a)(2) to require specific intent of drug activity would make redundant § 856(a)(1), violating a “cardinal principle of statutory construction”¹⁶³ The Supreme Court has not taken up this statutory interpretation issue.¹⁶⁴

The second proposed legal defense is that bona fide, locally authorized health facilities are excluded from the scope of the CSA.¹⁶⁵ This is functionally a federalism defense following precedent relating to physician-assisted suicide. Scholars have suggested that the 2006 Supreme Court case *Gonzales v. Oregon*¹⁶⁶ could provide SIFs with legal protection.¹⁶⁷ In *Gonzales*, the Court stated that the CSA “manifests no intent to regulate the practice of medicine generally.”¹⁶⁸ On one hand, some scholars maintain that *Gonzales* favors the legality of SIFs because they are public health initiatives managed and staffed by medical professionals.¹⁶⁹ Kreit, however, has warned that the precedential power of *Gonzales* is limited in a SIF case because *Gonzales* involved a rule authorizing the Attorney General to determine what uses of a medicine are legitimate, whereas a SIF case does not require an executive to assess the medical value of a site.¹⁷⁰

¹⁵⁷ See *id.* at 431–34.

¹⁵⁸ 713 F.3d 955 (8th Cir. 2013).

¹⁵⁹ *Tebeau*, 713 F.3d at 958.

¹⁶⁰ *Id.* at 958–59.

¹⁶¹ *Id.* at 960.

¹⁶² *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990); *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991); *United States v. Wilson*, 503 F.3d 195, 197–98 (2d Cir. 2007); *United States v. Bilis*, 170 F.3d 88, 92–93 (1st Cir. 1999); *United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993).

¹⁶³ *Tebeau*, 713 F.2d at 960 (citing *Williams v. Taylor*, 529 U.S. 362, 404 (2000)).

¹⁶⁴ Certiorari was denied in *Tebeau v. United States*, 571 U.S. 888 (2013).

¹⁶⁵ Burris et al., *Federalism*, *supra* note 44, at 1121–34.

¹⁶⁶ 546 U.S. 243 (2006).

¹⁶⁷ E.g., Burris et al., *Federalism*, *supra* note 44, at 1134–39.

¹⁶⁸ *Gonzales*, 546 U.S. at 270.

¹⁶⁹ See, e.g., Burris et al., *Federalism*, *supra* note 44, at 1138–39; see also Beletsky et al., *supra* note 137, at 234 (arguing that CSA’s legislative history shows that Congress’s intent was not to regulate a “legally authorized public health intervention” – traditionally within the realm of state police powers – but rather crack houses “during the height of the crack epidemic” and “‘rave’ parties”).

¹⁷⁰ Kreit, *supra* note 85, at 436–37.

Kreit also brought attention to a third idea: the CSA's own immunity provision.¹⁷¹ The provision states that:

no civil or criminal liability shall be imposed by virtue of this subchapter upon . . . any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.¹⁷²

According to Kreit, the immunity provision was designed to protect police officers from prosecution related to the drug crimes they would necessarily commit during undercover operations, but he posited that the provision could also be invoked for a state- or municipality-sanctioned SIF.¹⁷³ The provision allows immunity for: (1) an officer of any state, territory, political subdivision thereof, (2) with due authority, (3) lawfully engaging in the enforcement of any law or municipal ordinance relating to the controlled substance.¹⁷⁴ Should a city council pass an ordinance authorizing an SIF, Kreit proposed that the municipality and staff running the site be officers with due authority, pointing to state medical marijuana laws as precedent.¹⁷⁵ Courts repeatedly have held that police officers are immune from federal drug laws when ordered under state law to return marijuana to a patient.¹⁷⁶

Burris and his colleagues have raised an additional Commerce Clause argument, stating that “[o]ccasionally, and unpredictably, the Supreme Court decides that Congress has gone too far by seeking to regulate a matter with too tenuous a connection to commerce.”¹⁷⁷ They conceded that this argument was “speculation on stilts”¹⁷⁸ given unfavorable precedent in *Gonzales v. Raich*, where the Supreme Court held that CSA application to individuals who cultivated or obtained free medical marijuana was within the scope of the Commerce Clause.¹⁷⁹ Likewise, Kreit has called *Raich* “the death-knell for ‘as-applied’ challenges to a congressional exercise of Commerce Clause authority.”¹⁸⁰

¹⁷¹ *Id.* at 442–62.

¹⁷² 21 U.S.C. § 885(d).

¹⁷³ Kreit, *supra* note 85, at 443.

¹⁷⁴ 21 U.S.C. § 885(d).

¹⁷⁵ Kreit, *supra* note 85, at 445–46.

¹⁷⁶ *See id.* at 446–49 (discussing state court decisions immunizing police officers in medical marijuana-related cases).

¹⁷⁷ Beletsky et al., *supra* note 137, at 234.

¹⁷⁸ Burris et al., *Federalism*, *supra* note 44, at 1144.

¹⁷⁹ *Gonzales v. Raich*, 545 U.S. 1 (2005).

¹⁸⁰ Burris et al., *Federalism*, *supra* note 44, at 1144 n.240 (citing Alex Kreit, *Rights, Rules, and Raich*, 108 W. VA. L. REV. 705, 706 (2006)).

2. *United States v. Safehouse*: the § 856(a) battleground for SIFs

On February 5, 2019, the Department of Justice made good on its warning to block SIFs¹⁸¹ when William McSwain, the U.S. Attorney for the Eastern District of Pennsylvania, filed a civil complaint against Safehouse.¹⁸² Forgoing criminal charges with possible prison time, a fine of up to \$250,000, and forfeiture of property, the federal government chose to act preemptively with an austere request for declaratory judgment.¹⁸³ The complaint alleges that Safehouse “will knowingly and intentionally provide a place for drug users to use controlled substances unlawfully”¹⁸⁴

Safehouse filed an answer, counterclaim, and third-party complaint on April 3, 2019.¹⁸⁵ The answer contains many of the statutory interpretation arguments posited by legal scholars who considered this issue. First, Safehouse cited *Gonzales* as a limitation of CSA on “regulat[ing] the practice of medicine.”¹⁸⁶ Second, Safehouse argued for a narrow reading of § 856(a) to apply to drug dealers and “crack houses,” not public health measures: “the purpose of” language in the statute makes it inapplicable to their site, stating that its only purpose is to save lives by “enabling access to a critical medical intervention.”¹⁸⁷ Third, Safehouse also invoked a Commerce Clause argument.¹⁸⁸

Safehouse did not argue that it was immune from the CSA because, as Kreit observed, the immunity provision applies only to “duly authorized officer[s]” of a state or locality, so a privately-run SIF would not invoke the defense.¹⁸⁹ Safehouse could have tried to argue that it was duly authorized by the City of Philadelphia. However, while Philadelphia Mayor Jim Kenney has acknowledged the public benefits of a SIF, and Philadelphia District Attorney Larry Krasner has announced he does not intend to press charges in relation to the facility, Philadelphia City Council has not officially prohibited Safehouse from operating, and there is opposition to the use of public funds for this purpose.¹⁹⁰ To invoke the immunity defense, Safehouse would also need a law or municipal ordinance

¹⁸¹ See *supra* notes 150–51.

¹⁸² Complaint for Declaratory Judgment, *United States v. Safehouse*, 408 F. Supp. 3d 583 (E.D. Pa. Feb. 5, 2019) (No. 19-0519), 2019 WL 462760.

¹⁸³ The CSA imposes severe criminal penalties. 21 U.S.C. § 856(d); see also Rosenstein, *supra* note 151 (“It is a federal felony to maintain any location for the purpose of facilitating illicit drug use. Violations are punishable by up to 20 years in prison, hefty fines and forfeiture of the property used in the criminal activity.”).

¹⁸⁴ Amended Complaint for Declaratory Judgment at 6, *United States v. Safehouse*, 408 F. Supp. 3d 583 (E.D. Pa. May 28, 2019) (No. 19-0519), 2019 WL 6704498.

¹⁸⁵ Defendant Safehouse’s Answer, Affirmative Defenses, Counterclaims to Plaintiff’s Complaint, and Third-Party Complaint, 408 F. Supp. 3d 583 (E.D. Pa. Apr. 3, 2019) (No. 19-0519), 2019 WL 8723727 [hereinafter Answer].

¹⁸⁶ *Id.* at 20.

¹⁸⁷ *Id.* at 29, 32–33.

¹⁸⁸ *Id.* at 35–38.

¹⁸⁹ See Kreit, *supra* note 85, at 462 (suggesting Philadelphia may trigger CSA immunity by “passing an ordinance to closely regulate safe injection sites and designating all Safehouse employees as ‘duly authorized officer[s]’ of the city.”).

¹⁹⁰ Elana Gordon, *What’s Next for ‘Safe Injection’ Sites in Philadelphia?*, NPR (Jan. 24, 2018, 3:43 PM), <https://www.npr.org/sections/health-shots/2018/01/24/580255140/whats-next-for-safe-injection-sites-in-philadelphia> [https://perma.cc/FQU9-CKSJ]; Pat Loeb & Tim Jimenez, *Safehouse Voluntarily Delays Opening of South Philadelphia Safe Injection Site*, KYW NEWSRADIO (Feb. 28, 2020, 11:45 AM), <https://www.radio.com/kywnnewsradio/articles/news/safehouse-delays-opening-of-safe-injection-site> [https://perma.cc/D3RR-T2K6].

to enforce. A Philadelphia city ordinance authorizing Safehouse would have been the most straightforward vehicle, but without it, Safehouse could still look to the myriad laws and ordinances regarding clean needle exchanges, naloxone distribution, counseling and social services, and other legislation related to its mission.

Safehouse's answer was a vivid appeal to logic. Safehouse pointed to state and federal laws endorsing and funding syringe exchange programs and naloxone.¹⁹¹ The government supports the furnishing of clean needles for drug consumption, and of overdose medication such as naloxone, but "under the DOJ's rationale, a syringe exchange program is transformed from a legal, federally endorsed public health measure into a 20-year felony simply by allowing participants to remain . . . under the supervision of its medical practitioners at the critical moment of consumption when death is most likely to occur."¹⁹² Implicit in this line of argument is the suggestion that policy should make sense—that steadfast enforcement of criminal law against an SIF is not compatible with the commonsense policy that when drug users have access to clean needles, and to people who can administer naloxone, they should not be forced to leave the building and go to an unsupervised park to use their drugs.

Safehouse's most innovative argument, the only one not foreseen in the scholarly literature, invoked protection under the Religious Freedom Restoration Act (RFRA). Safehouse brought a counterclaim that RFRA bars the application of § 856(a) to their organization, where the founders and directors are exercising their religious beliefs to save lives.¹⁹³ Under RFRA,

[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless the government can] demonstrate[] that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.¹⁹⁴

In the Safehouse case, the defendants stated they were exercising their Judeo-Christian religious beliefs by protecting life, providing shelter, and caring for the ill.¹⁹⁵ The government then faced the burden of proving that the enforcement of § 856(a) to close Safehouse is the least restrictive means of fostering its compelling interest.¹⁹⁶

Safehouse is not a religiously affiliated organization, and its proposed site will not hold religious services. But RFRA applies to any federal action that substantially burdens a person's exercise of religion, and, under *Burwell v. Hobby Lobby*, running a corporation "in a manner consistent with" religious beliefs is an exercise of religion.¹⁹⁷

¹⁹¹ Answer, *supra* note 185, at 24–28.

¹⁹² *Id.* at 24.

¹⁹³ *Id.* at 38–41.

¹⁹⁴ 42 U.S.C. §§ 2000bb-1(a), (b).

¹⁹⁵ Answer, *supra* note 185, at 41.

¹⁹⁶ *Id.*

¹⁹⁷ 572 U.S. 682, 703, 708–19 (2014).

RFRA analysis compels a discussion of the policy issues at stake. Rather than arguing about whether § 856(a) *can* be enforced against Safehouse, under RFRA the government had to explain why § 856(a) *must* be enforced against them. Is the government's compelling interest to prevent drug consumption? To save lives? Safehouse can then provide evidence on how its site would advance, not hinder, those interests. Defendants pitched *United States v. Safehouse* as an ideological re-match of RFRA protections after *Hobby Lobby*, whose holding has been admonished as discriminatory.¹⁹⁸

The government did not take the RFRA bait to discuss its compelling interest in shutting down SIFs. Instead, in its motion for judgment on the pleadings, the government contended that Safehouse was not protected by RFRA.¹⁹⁹ They argued that defendants' beliefs were not substantially burdened because the defendants were not being coerced to do anything—the government merely asked that they keep to the *status quo*.²⁰⁰ Moreover, the government argued, Safehouse had alternative means available, and their proposed conduct was not so much religious as socio-political or philosophical.²⁰¹ On the RFRA issue, the court also expressed its disfavor for “transform[ing] an issue of statutory construction into a public policy debate.”²⁰²

In February 2020, the district court granted Safehouse's motion for declaratory judgment.²⁰³ The court found for Safehouse on § 856(a)(2) interpretation,²⁰⁴ in part because Congress did not intend or mean for § 856(a)(2) to apply to SIFs as they had not yet entered public discourse.²⁰⁵ For now, the application of RFRA and the Commerce Clause to SIFs has been tabled,²⁰⁶ but as of this Article's publication, the final outcome remains to be seen. In June 2020, the court granted the government's request for a stay pending their appeal to the Third Circuit.²⁰⁷

¹⁹⁸ See, e.g., Richard J. D'Amato, Note, *A “Very Specific” Holding: Analyzing the Effect of Hobby Lobby on Religious Liberty Challenges to Housing Discrimination Laws*, 16 COLUM. L. REV. 1063, 1063, 1085–88 (2016) (theorizing that landlords seeking to discriminate against LGBT individuals may be able to seek exemption from antidiscrimination laws under RFRA as a result of *Hobby Lobby*).

¹⁹⁹ Plaintiff's Motion for Judgment on the Pleadings at 23–24, 408 F. Supp. 3d 583 (E.D. Pa. June 11, 2019) (No. 19-0519), 2019 WL 8723739.

²⁰⁰ *Id.* at 25.

²⁰¹ *Id.* at 28–29.

²⁰² *United States v. Safehouse*, No. 19-519, 2020 U.S. Dist. LEXIS 110549, at *8 (E.D. Pa. June 24, 2020).

²⁰³ *United States v. Safehouse*, No. 19-0519, 2020 U.S. Dist. LEXIS 31620, at *1 (E.D. Pa. Feb. 25, 2020).

²⁰⁴ *United States v. Safehouse*, 408 F. Supp. 3d 583, 618 (E.D. Pa. Oct. 2, 2019).

²⁰⁵ *Safehouse*, 2020 U.S. Dist. LEXIS 31620, at *9 (referencing prior opinion); *Safehouse*, 408 F. Supp. 3d at 585 (“[N]o credible argument can be made that facilities such as safe injection sites were within the contemplation of Congress either when it adopted § 856(a) in 1986, or when it amended the statute in 2003.”).

²⁰⁶ *Safehouse*, 2020 U.S. Dist. LEXIS 31620, at *9.

²⁰⁷ *Safehouse*, 2020 U.S. Dist. LEXIS 110549, at *1.

V. CONCLUSION

February 2020 headlines read: “Judge clears path for Philadelphia nonprofit to open safe-injection site to combat overdoses;”²⁰⁸ “Philly’s Safehouse to open nation’s first supervised injection site after judge clearance;”²⁰⁹ “Federal Judge Clears Way For Nation’s First Supervised Injection Site To Open In Philadelphia.”²¹⁰ But experience demonstrates that an SIF’s legal viability cannot be guaranteed by a federal judge. Decisionmakers and stakeholders at each level of government must also clear the way. A locality seeking to open an SIF will undoubtedly face a complex series of hurdles, from local ordinances and zoning to state preemption. Even with Safehouse’s latest victory in federal court, its legal status remains precarious as Philadelphia City Council voices its disapproval. When the U.S. gets its first SIF, it will not be because of a federal case, or because of a change in presidential administration. It will be because of the careful alignment of harm reduction advocacy, local law, police noninterference, state sanction or discretion, and federal sanction or discretion.

²⁰⁸ Eric Levenson & Lauren del Valle, *Judge Clears Path for Philadelphia Nonprofit to Open Safe-Injection Site to Combat Overdoses*, CNN (Feb. 26, 2020, 7:22 PM), <https://www.cnn.com/2020/02/26/us/philadelphia-supervised-injection-site/index.html> [https://perma.cc/Q23D-PZJZ].

²⁰⁹ Michaela Winberg, *Philly’s Safehouse to Open Nation’s First Supervised Injection Site After Judge Clearance*, BILLY PENN (Feb. 25, 2020, 4:50 PM), <https://billypenn.com/2020/02/25/nothing-procedurally-improper-safehouse-injection-site-gets-judges-final-clearance/> [https://perma.cc/AM36-6WAB].

²¹⁰ *Federal Judge Clears Way for Nation’s First Supervised Injection Site to Open in Philadelphia*, CBS PHILLY (Feb. 25, 2020, 11:59 PM), <https://philadelphia.cbslocal.com/2020/02/25/federal-judge-clears-way-for-nations-first-supervised-injection-site-to-open-in-philadelphia/> [https://perma.cc/B9QJ-N58P].